

This Opinion is Not a
Precedent of the TTAB

Mailed: August 26, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re LG Electronics Inc.

Serial No. 88055289

Robert J. Kenney and Michael T. Smith of Birch, Stewart, Kolasch & Birch, LLP,
for LG Electronics Inc.

Anthony Rinker, Trademark Examining Attorney, Law Office 102,
Mitchell Front, Managing Attorney.

Before Zervas, Shaw, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

LG Electronics Inc. (“Applicant”) seeks registration on the Principal Register of
the proposed standard character mark DOOR-IN-DOOR for “Electric refrigerators,”
in International Class 11.¹

¹ Application Serial No. 88055289 was filed on July 27, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on claimed use of the mark anywhere and use of the mark in commerce since at least as early as June 2012. Applicant claims that the proposed mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

The Trademark Examining Attorney has refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of the goods identified in the application, and has not acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

When the refusal was made final, Applicant appealed and requested reconsideration, which was denied. The appeal is fully briefed.² We affirm the refusal to register.

I. Record on Appeal³

The record on appeal includes Applicant's specimen, a portion of which we reproduce below:

² Citations in this opinion to the briefs refer to TTABVue, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVue corresponds to the docket entry number, and any numbers following TTABVue refer to the page number(s) of the docket entry where the cited materials appear.

³ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). As discussed below, although Applicant has conceded that its proposed mark is merely descriptive by seeking registration under Section 2(f), *see In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, *2 (TTAB 2020), the degree of descriptiveness of the mark must be considered in the analysis of the sufficiency of Applicant's Section 2(f) showing, *Royal Crown Cola Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1047-48 (Fed. Cir. 2018); *Guaranteed Rate*, 2020 USPQ2d 10869 at *3, so we will summarize the record evidence regarding both mere descriptiveness and acquired distinctiveness.



WITH LG,
IT'S ALL POSSIBLE.

INSTANT
ACCESS TO YOUR
FAVORITE FOODS.
HOW DREAMY.

LG DOOR-IN-DOOR™
is the ultimate organizer.
The innovative door
within a door feature
makes it easier than ever to
access gotta-have snacks and
beverages without opening the
entire refrigerator. And since
more cool air remains
inside, you will conserve
energy. It's instant
gratification for everyone.

 **LG**
Life's Good

 Model shown: #LFX31945ST. Visit lgusa.com/doorindoor for more information.

 INVERTER
LINEAR
COMPRESSOR
10
YEAR
WARRANTY
INNOVATION
THAT LASTS

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and the following additional materials:⁵

⁴ July 7, 2018 Application at TSDR 5.

⁵ Applicant attached most of the materials that it made of record as exhibits to its appeal brief. 4 TTABVUE 8-59. “Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or convenience to the Board. It is neither.” *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014). On an appeal, the entire record “is readily available to the panel,” and because “we must determine whether attachments to briefs are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during prosecution of the application.” *Id.* at 1950-51. This “requir[es] more time and effort than would have been necessary if citations directly to the prosecution history were provided.” *Id.* at 1951.

- Dictionary definitions of the words “door,” and “in,” made of record by the Examining Attorney;⁶
- USPTO electronic records regarding Applicant’s cancelled Principal Register Registration No. 4235912 of the mark DID DOOR IN DOOR (DOOR-IN-DOOR disclaimed) for electric refrigerators, Applicant’s Supplemental Register Registration No. 4766120 of the mark DOOR-IN-DOOR for electric refrigerators, and Applicant’s Supplemental Register Registration No. 4887090 of the mark DUAL DOOR-IN-DOOR for electric refrigerators and other goods, made of record by the Examining Attorney;⁷
- Internet webpages and advertisements reflecting the use of Applicant’s proposed mark by Applicant’s retailers and by Applicant, made of record by Applicant;⁸ and
- Excerpts from a study described as “2012 TVC Ad Detail Results” regarding consumer responses to certain of Applicant’s advertisements,⁹ a chart of Applicant’s marketing expenditures during the period 2013-2017 to promote goods bearing the proposed mark,¹⁰ examples of print advertising for goods

⁶ November 23, 2018 Office Action at TSDR 2-11.

⁷ *Id.* at TSDR 12-20.

⁸ May 23, 2019 Response to Office Action at TSDR 2-23.

⁹ November 25, 2019 Request for Reconsideration at TSDR 1-3.

¹⁰ *Id.* at TSDR 4.

bearing the proposed mark,¹¹ and invoices for point-of-sale displays for goods bearing the proposed mark,¹² all made of record by Applicant.

II. Analysis of Refusal

Applicant has conceded that DOOR-IN-DOOR is merely descriptive by claiming in its appeal brief that the mere descriptiveness refusal to register “should be reversed because the mark has acquired the distinctiveness necessary to be eligible for registration” 4 TTABVue 3. *See Guaranteed Rate*, 2020 USPQ2d 10869 at *2. Section 2(f) of the Trademark Act provides that a proposed mark found to be merely descriptive under Section 2(e)(1) of the Act may be registered on the Principal Register if “it has become distinctive of the applicant’s goods in commerce.” 15 U.S.C. § 1052(f). *See Guaranteed Rate*, 2020 USPQ2d 10869 at *2-3. “To establish that a term has acquired distinctiveness, ‘an applicant must show that in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.’ *Id.* at *2 (quoting *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015)).

“To meet this burden, an applicant may offer three basic types of evidence:

1. A claim of ownership of one or more active prior registrations on the Principal Register of the same mark for goods or services that are sufficiently similar to those identified in the pending application. Trademark Rule 2.41(a)(1), 37 C.F.R. § 2.41(a)(1).
2. A verified statement that the mark has become distinctive of the applicant’s goods or services by reason of the applicant’s substantially exclusive and continuous use

¹¹ *Id.* at TSDR 5-8.

¹² *Id.* at TSDR 9-21.

of the mark in commerce for five years before the date on which the claim of distinctiveness is made. Trademark Rule 2.41(a)(2), 37 C.F.R. § 2.41(a)(2).

3. Other appropriate evidence of acquired distinctiveness. Trademark Rule 2.41(a)(3), 27 C.F.R. § 2.41(a)(3).

Id. An “applicant may submit one or any combination of these types of evidence.” *Id.* “Our ultimate Section 2(f) analysis of acquired distinctiveness and determination in this case is based on all of the evidence considered as a whole.” *Id.*

In determining whether DOOR-IN-DOOR has acquired distinctiveness, we consider the following six factors:

(1) association of the [mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.

Id. at *3 (quoting *In re Snowizard, Inc.*, 129 USPQ2d 1001, 1005 (TTAB 2018) (quoting *Converse, Inc. v. Int’l Trade Comm’n*, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018))). Where evidence is presented on these factors, they “are to be weighed together in determining the existence of secondary meaning.” *Id.* (quoting *Converse*, 128 USPQ2d at 1546).

A. The Degree of Descriptiveness of Applicant’s Proposed Mark

“To assess Applicant’s burden in showing acquired distinctiveness, we must determine the degree of descriptiveness of [DOOR-IN-DOOR].” *Id.* (citing *In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, *10 (TTAB 2019) (internal citation omitted)). Applicant does not address this issue in its briefs. The Examining

Attorney argues that the proposed mark “is highly descriptive of applicant’s goods” because “DOOR-IN-DOOR immediately describes a feature of a refrigerator incorporating a design of a main door that encloses or surrounds a second smaller door inside it.” 6 TTABVUE 5-6.

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *Royal Crown*, 127 USPQ2d at 1046). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods.’” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)).

The record contains multiple examples of statements in Applicant’s advertising and promotional materials that discuss the “Door-in-Door” feature of its refrigerators.

We reproduce several examples below:

• InstaView™ Door-in-Door® has a sleek glass panel that allows you to see inside the easy access door without letting the cold air out 13

• The LG Door-in-Door® provides quick and easy access to foods and beverages 14

¹³ May 23, 2019 Response to Office Action at TSDR 15. All highlighting in these materials was supplied by Applicant.

¹⁴ *Id.*

- Door-in-Door® with ColdSaver™ Panel reduces cold air loss to extend the freshness of food

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Raid the Fridge without Losing Your Cool

InstaView™ Door-in-Door® refrigerators have a sleek glass panel that allows you to see inside the easy access door without letting the cold air out. Simply knock twice on the glass to illuminate the contents within.

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Easy Access to Family Favorites

For those fly-by visits to the refrigerator, the Door-In-Door® feature allows you to get in and get out providing easy access to beverages and snacks. On LG Door-In-Door® models include bonus door bins for added organization and storage.

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For Families On-The-Go:
LG Super-Capacity French Door with Door-in-Door™ keeps food front and center for quick and easy access for those items you use all the time. GHI says, "This model offers plenty of flexible storage space, from its four adjustable glass shelves to a handy Glide'N'Serve Drawer for large platters, making it a great pick for a feature-loaded fridge." Model # LFX31945

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¹⁵ *Id.*

¹⁶ *Id.* at TSDR 18.

¹⁷ *Id.*

¹⁸ *Id.* at TSDR 21.



The advertisement features a photograph of an LG refrigerator with its inner door open, revealing a small compartment with various snacks and drinks. In the background, a person's legs and feet are visible, suggesting a family setting. The text on the right side of the image reads: "#MOMCONFESSIONS", "The new LG Door-in-Door™ Refrigerator with CustomChill™ Drawer makes it easier than ever to access favorite foods and beverages without opening the entire fridge. Cold air loss is reduced by up to 47%*, so food stays fresher longer. And with our versatile CustomChill™ drawer, you have four temperature settings to handle a wide variety of storage needs.", and "With LG, it's all possible.™". The model number "LMXS30776" is printed at the bottom left of the image.

LMXS30776

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The advertisement shows a close-up of the LG Door-in-Door refrigerator with its inner door open, displaying a variety of beverages and snacks. The text on the right side of the image reads: "LG DOOR-IN-DOOR™ is the ultimate organizer. The innovative door within a door feature makes it easier than ever to access gotta-have snacks and beverages without opening the entire refrigerator. And since more cool air remains inside, you will conserve energy. It's instant gratification for everyone." Below the text is the LG logo and the tagline "Life's Good".

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These materials explain verbally and visually that the DOOR-IN-DOOR feature of Applicant's refrigerators involves a second door built into the primary refrigerator door. As the promotional piece immediately above states, the "door within a door

¹⁹ *Id.* at TSDR 22.

²⁰ *Id.* at TSDR 23.

feature” enables a user of the refrigerator “to access gotta-have snacks and beverages without opening the entire refrigerator.” The picture immediately below shows the Door-in-Door feature in use:



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We agree with the Examining Attorney that the record shows “that applicant is offering a refrigerator incorporating a design feature of a main door that encloses or surrounds a second smaller door inside of it. Applicant’s refrigerators feature a door within a door.” 6 TTABVUE 4. We find that the proposed mark DOOR-IN-DOOR is

²¹ *Id.* at TSDR 21.

highly descriptive of a key feature of the refrigerators, particularly because the key feature is described as a “door within a door.” “Because of the highly descriptive nature of the proposed mark, Applicant faces a proportionately higher burden to establish acquired distinctiveness.” *Guaranteed Rate*, 2020 USPQ2d 10869 at *4 (citing *Royal Crown*, 127 USPQ2d at 1047).

B. The Sufficiency of Applicant’s Evidence of Acquired Distinctiveness

As noted above, the Board explained in *Guaranteed Rate* that we must consider all of the evidence proffered by Applicant to determine whether it is sufficient, in its totality, to show that DOOR-IN-DOOR has acquired distinctiveness as Applicant’s mark. *Guaranteed Rate*, 2020 USPQ2d 10869 at *2. Applicant offers its prior registrations and a claim of more than five years’ use, as well as a purported consumer study, evidence of marketing expenditures, and examples of its advertising.

We turn first to Applicant’s registration and five years’ use evidence because “[d]epending on the nature of the mark and the facts in the record, the examining attorney may determine that a claim of ownership of a prior registration(s) or a claim of five years’ substantially exclusive and continuous use in commerce is insufficient to establish a prima facie case of acquired distinctiveness.” *Id.* In that case, Applicant must rely on its “other evidence of acquired distinctiveness.” *Id.*

1. Prior Registration No. 4235912

Trademark Rule 2.41(a) provides that an applicant’s “ownership of one or more active prior registrations on the Principal Register . . . of the same mark may be accepted as prima facie evidence of distinctiveness if the goods or services are

sufficiently similar to the goods and services in the application.” 37 C.F.R. § 2.41(a).

Applicant argues that

[A]t the time the Application was filed, Applicant was the owner of US Reg. No. 4235912 for the mark DID DOOR IN DOOR for use with “electric refrigerators.” The prior registration was in full force and effect until at least May 6, 2019. The Application was filed July 27, 2018. Thus, the prior registration was valid at the time the Application was filed and Applicant claimed that the DOOR-IN-DOOR mark had acquired distinctiveness for use with “electric refrigerators.”

4 TTABVUE 3-4. Applicant argues that the DID DOOR-IN-DOOR mark in this prior registration was the “same mark” as its proposed DOOR-IN-DOOR mark within the meaning of Trademark Rule 2.141(a)(1) because the two marks are legal equivalents, *id.* at 4, and that it “may tack its use of DOOR-IN-DOOR onto the prior registration for DID DOOR IN DOOR for the identical goods as evidence that Applicant’s mark has acquired the distinctiveness necessary to be registrable on the Principal Register.” *Id.* at 5.

The Examining Attorney responds that even assuming that the marks are legal equivalents, “ownership of one or more prior registrations in which the relevant wording is disclaimed is insufficient in this case to establish a claim of acquired distinctiveness under Trademark Act Section 2(f).” 6 TTABVUE 7.

We agree with the Examining Attorney. Applicant’s cancelled registration disclaimed the exclusive right to use DOOR-IN-DOOR, which is an admission of the descriptiveness of that term when the disclaimer was entered, *Quaker State Oil Refining Corp. v. Quaker Oil Co.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972), and Applicant cannot rely on the cancelled registration to show that the disclaimed

term DOOR-IN-DOOR has acquired distinctiveness. *Kellogg Co. v. Gen. Mills, Inc.*, 82 USPQ2d 1766, 1771 n.5 (TTAB 2007).

2. Five or More Years of Substantially Exclusive and Continuous Use and Applicant's Other Registration

Applicant offers “[a]s further evidence that Applicant’s DOOR-IN-DOOR mark has acquired the distinctiveness necessary for registration on the Principal Register” its “continuous and substantially exclusive use of the mark since at least as early as June 2012.” 4 TTABVUE 5. Applicant argues that its Supplemental Register Registration No. 4766120 for the claimed mark DOOR-IN-DOOR for electric refrigerators “confirms Applicant’s use of the mark at least as early as June 2012.” *Id.*

The Examining Attorney responds that Applicant’s claim “is insufficient to show acquired distinctiveness because the applied-for mark is highly descriptive of applicant’s goods, i.e., the terms [sic] DOOR-IN-DOOR immediately describes a feature of a refrigerator incorporating a design of a main door that encloses or surrounds a second smaller door inside of it.” 6 TTABVUE 5-6. The Examining Attorney also argues that Applicant “may not base a claim of acquired distinctiveness under Trademark Act Section 2(f) on ownership of a registration on the Supplemental Register.” *Id.* at 7.

In its reply brief, Applicant argues that in *Converse*, the Federal Circuit found that “‘five years’ substantially exclusive and continuous use [of a mark] to weigh strongly in favor of a finding of secondary meaning,” 7 TTABVUE 2 (quoting *Converse*, 128 USPQ2d at 1547), and that Applicant “has used the DOOR-IN-DOOR

mark substantially exclusively for nearly twice the time deemed by the Federal Circuit to ‘weigh strongly in favor of a finding of secondary meaning.’” *Id.* (quoting *Converse*, 128 USPQ2d at 1547). Applicant concludes that “[b]ased on this evidence alone, the application should be approved for publication.” *Id.*

Applicant’s reliance on *Converse* is misplaced because Applicant’s quotation from the opinion is offered out of context. The quoted language appears in a section of the opinion addressing “the significance of the trademark owner’s and third parties’ prior uses of the [involved] mark,” *Converse*, 128 USPQ2d at 1546, specifically, the determination of the “most relevant period” of such uses for assessing, in infringement cases, the trademark owner’s exclusivity of use. *Id.* The Federal Circuit held that Section 2(f) “sets up an evidentiary rule for the [USPTO] Director rather than courts,” *id.*, but noted (in the portion of the opinion quoted by Applicant) that “**several other courts of appeals**, drawing on section 2(f), have found five years’ substantially exclusive and continuous use to weigh strongly in favor of a finding of secondary meaning.” *Id.* at 1547 (emphasis added) (citing *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 46 USPQ2d 1026, 1040 (7th Cir. 1998); *Sunbeam Prods., Inc. v. W. Bend Co.*, 123 F.3d 246, 44 USPQ2d 1161, 1167 (5th Cir. 1997), *abrogated on other grounds by TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 58 USPQ2d 1001 (2001); *Stuart Hall Co. v. Ampad Corp.*, 51 F.3d 780, 34 USPQ2d 1428, 1435 (8th Cir. 1995); *FN Herstal SA v. Clyde Armory Inc.*, 838 F.3d 1071, 120 USPQ2d 1186, 1195-96 (11th Cir. 2016) (declining to rely on Section 2(f)). The Federal Circuit agreed with these courts to the extent that they “recognize[d] the importance of

looking to this five-year period,” and held that “in evaluating factor 2 [length, degree, and exclusivity of use], the ITC should reply principally on uses within the last five years,” *id.*, rather than uses “older than five years,” which “should only be considered relevant if there is evidence that such uses were likely to have impacted consumers’ perceptions of the mark as of the relevant date.” *Id.*

Accordingly, *Converse* does not stand for the proposition that “‘five years’ substantially exclusive and continuous use [of a mark] . . . weigh[s] strongly in favor of a finding of secondary meaning,” 7 TTABVue 2, or abrogate the Federal Circuit’s previous holding that for purposes of registration,

Although Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f), provides that that the PTO may accept five years of “substantially exclusive and continuous” use as *prima facie* evidence of acquired distinctiveness, the statute does not require the PTO to do so. Particularly for a mark that is as highly descriptive like FISH FRY PRODUCTS, the Board was within its discretion not to accept Louisiana Fish Fry’s alleged five years of substantially exclusive and continuous use as *prima facie* evidence of acquired distinctiveness.

La. Fish Fry Prods., 116 USPQ2d at 1265.

Applicant’s reliance on its Supplemental Register registration is similarly unavailing. That registration is not a registration “on the Principal Register” within the meaning of Trademark Rule 2.141(a)(1), and it cannot be relied on to establish the length of Applicant’s use of DOOR-IN-DOOR because “registrations on the supplemental register shall not be subject to or receive the advantages of” Section 7(b) of the Trademark Act.” 15 U.S.C. § 1094. *See In re Federated Dep’t Stores Inc.*, 3 USPQ2d 1541, 1543 (TTAB 1987) (“[A] Supplemental Register registration is

evidence of nothing more than the fact that the registration issued on the date printed thereon.”).

We agree with the Examining Attorney that given the highly descriptive nature of the proposed DOOR-IN-DOOR mark, Applicant’s unsubstantiated and unspecific claim of “extensive use of the mark . . . since at least as early as 2012,” 4 TTABVue 6,²² has little probative value in showing that DOOR-IN-DOOR has acquired “the distinctiveness to be registrable on the Principal Register.” *Id. Cf. Guaranteed Rate*, 2020 USPQ2d 10869 at *4-6 (applicant’s sales under of mark in excess of \$3.5 billion in last 11 fiscal years were “impressive,” but insufficient to show acquired distinctiveness even when coupled with other evidence). Accordingly, Applicant must rely on its “other evidence of acquired distinctiveness.” *Id.* at *2.

3. Applicant’s Other Evidence

Applicant correctly notes that under

Trademark Rule 2.41(a)(3), 37 C.F.R. §2.41(a)(3), an applicant may submit affidavits, declarations under 37 C.F.R. §2.20, depositions, or other appropriate evidence showing the duration, extent, and nature of the applicant’s use of a mark in commerce that may lawfully be regulated by the U.S. Congress, advertising expenditures in connection with such use, letters, or statements from the trade and/or public, or other appropriate evidence tending to show that the mark distinguishes the goods or services.

4 TTABVue 6 (citing TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) Section 1212.06). But Applicant’s claim of “extensive use of the mark as shown in the attached evidence since at least as early as 2012,” *id.*, is based solely on argument of

²² Applicant’s claim is unaccompanied by any evidence of the “amount of sales and number of customers,” the fourth *Converse* consideration.

counsel, which is “no substitute for evidence.” *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, *14 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)). Applicant offers no affidavit or declaration establishing the particulars of the claimed use, or authenticating and explaining the materials that Applicant submitted. As a general matter, and for the particular reasons discussed above and below, the absence of such a sworn statement materially undermines the probative value of Applicant’s evidence. *Cf. La. Fish Fry Prods.*, 116 USPQ2d at 1265 (discussing contents of the declaration of the applicant’s President that provided applicant’s sales figures); *Guaranteed Rate*, 2020 USPQ2d 10869 at *4-6 (discussing contents of the declaration of the applicant’s Chief Compliance Officer that provided sales and advertising figures, the number of the applicant’s customers, examples of the applicant’s advertising, and evidence of media coverage of services offered under the claimed mark); *In re Hikari Sales USA, Inc.*, 2019 USPQ2d 111514, *15-16 (TTAB 2019) (discussing contents of the declaration of the applicant’s President and Chief Operating Officer regarding the applicant’s sales and advertising under the claimed mark).

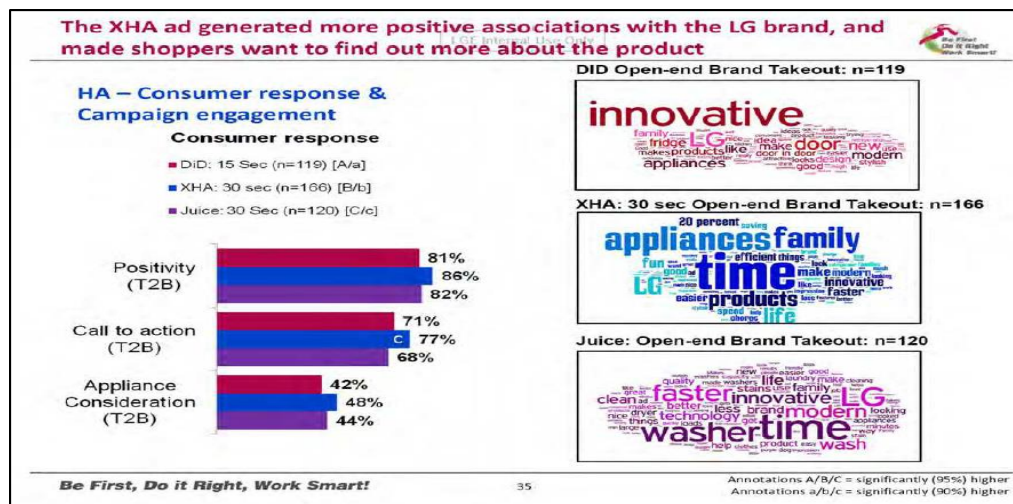
a. Applicant’s Consumer Response Evidence

One consideration in assessing acquired distinctiveness is direct evidence of the “association of the [mark] with a particular source by actual purchasers (typically measured by customer surveys).” *Guaranteed Rate*, 2020 USPQ2d 10869 at *3. *See generally Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1508-09 (TTAB 2017) (discussing survey evidence under Section 2(f)). Applicant offers what it

describes as “[c]onsumers’ recall and branding response to the DOOR-IN-DOOR (DID) mark” and “[c]onsumers’ response and engagement in view of the DID advertising.”⁴ TTABVUE 6. Applicant claims that its “consumer recall data . . . shows that nearly 100% of consumers who recalled the mark attributed the DOOR-IN-DOOR mark to Applicant, and over 80% perceived the DOOR-IN-DOOR brand positively.”⁷ TTABVUE 3-4.

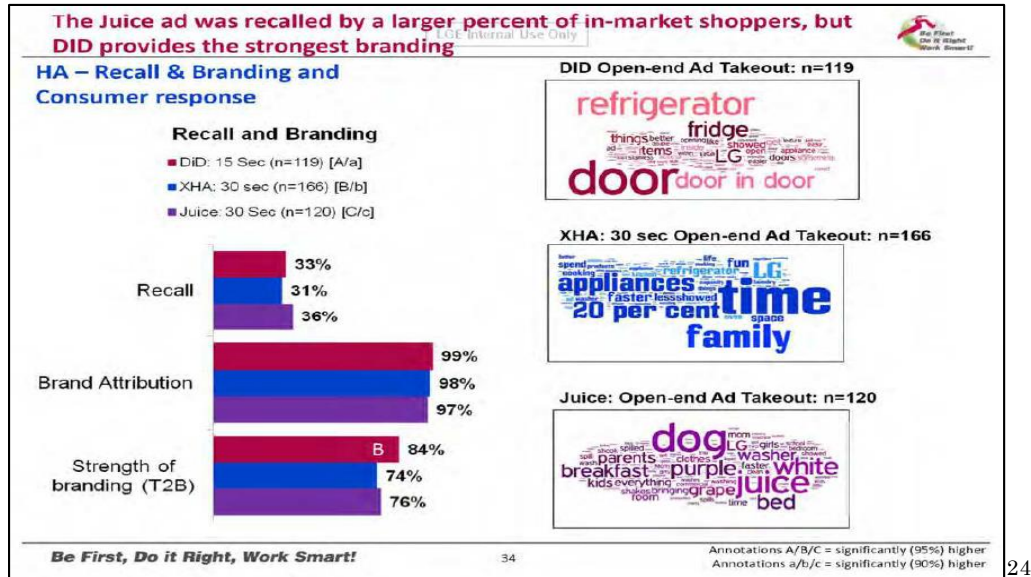
The Examining Attorney accurately describes this evidence as “consisting of a two page excerpt from of [sic] a marketing study that appears to include statistical results for consumer reactions to three different types of advertisements, where the mark ‘door in door’ appears in one of the advertisements in the study alongside dozens of other random terms and trademarks.”⁶ TTABVUE 8. He argues that it “is not probative on the issue of applicant’s claim of acquired distinctiveness,” *id.* at 10, due to Applicant’s failure to provide information regarding the survey. *Id.* at 8-10.

We reproduce the excerpted pages below:



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²³ November 25, 2019 Request for Reconsideration at TSDR 2.



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Applicant does not provide any explanation of the origin,²⁵ purpose, nature, or methodology of these studies involving the three referenced “XHA,” “Juice,” and “DID” advertisements,²⁶ or even such elementary information as the questions that were asked, and we thus have no basis on which to assess the validity of the studies or their purported conclusions.

²⁴ *Id.* at TSDR 3.

²⁵ The studies are stamped with the notation “LGE Internal Use Only,” *id.* at TSDR 2-3, but it is not clear whether they were conducted by Applicant or an outside entity.

²⁶ As discussed and shown above, Applicant made of record several advertisements containing the proposed DOOR-IN-DOOR mark, including ones that discuss the “LG Door-in-Door™ Refrigerator,” May 23, 2019 Response to Office Action at TSDR 22, and the “LG Super-Capacity French Door with Door-in-Door™.” November 25, 2019 Request for Reconsideration at TSDR 5. It is not clear whether any of these advertisements are among the ones that were shown in the studies from which the excerpts were taken, but the use of any survey stimulus containing references to Applicant would violate “the well-settled principle that advertising or use that features other marks or potential source-indicating material that are absent from the application fails to demonstrate that the mark at issue, *by itself*, has acquired distinctiveness.” *Kohler*, 125 USPQ2d at 1512. Acquired distinctiveness surveys “are supposed to test only whether an *applied-for mark* is viewed, *by itself*, as a source indicator.” *Id.* at 1511-12.

Moreover, during prosecution Applicant described the studies as being conducted in November 2012,²⁷ and a study of consumer perception conducted so long before Applicant's claim of acquired distinctiveness has little, if any, probative value even if it were properly done and supported. "[S]econdary meaning is a time-related concept: it exists at a specific time, in a specific place, among a specific group of people who recognize that specified matter indicates commercial origin of a specified type of product or service from one unique commercial source." *Royal Crown*, 127 USPQ2d at 1049 (quoting 4A CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 20.23 (4th ed. 2017)). "Therefore, a survey is only probative if it deals with conditions at the appropriate time." *Id.* (quotation omitted) (finding that an acquired distinctiveness survey conducted more than five years before the close of testimony before the Board had "questionable" probative value because it could "not disclose contemporary public perception" of the involved term).

We disagree with Applicant that if this evidence is not "a sufficiently scientific survey . . . the information is instructive nonetheless and should not be discounted in its entirety." 7 TTABVUE 4. We find that these pages, presented in isolation, have no probative value on the issue of whether Applicant's proposed mark has acquired distinctiveness. *See generally* TMEP Section 1212.06(d) and cases cited therein (discussing requirements for survey evidence); *Kohler*, 125 USPQ2d at 1508-09.

²⁷ November 25, 2019 Request for Reconsideration at TSDR 1.

b. Applicant's Advertising Expenditures

Applicant also proffers the chart reproduced below, which its counsel describes as setting forth “[m]arketing expenditures to promote goods bearing or sold under the DOOR-IN-DOOR mark from 2013-2017.” 4 TTABVUE 6.²⁸

(\$K)

COE	2013	2016	2017	'13-'17 TTL
TV		1,000,000	9,950,000	10,950,000
Print			281,443	281,443
Digital Media			2,000,000	2,000,000
PR			179,333	179,333
Production		2,066,000	160,000	2,226,000
In-Store Display	200,000	329,886	1,792,551	2,322,437
MKR		3,235	62,880	66,115
TTL	200,000	3,399,121	14,426,207	18,025,328

On its face, the total figure of more than \$18 million is a fairly large one. Upon closer examination, however, Applicant's advertising expenditures are not persuasive evidence of acquired distinctiveness for several reasons.

First, they do not support Applicant's grandiose claim of “persistent and continuous use of a mark in various media for nearly a decade.” 7 TTABVUE 4. At most, the chart covers only three years, and many of the expense categories have no

²⁸ Applicant does not specify whether these expenditures are for the United States only. Applicant also made of record what it describes as “[e]xamples of invoices for point of sale displays purchases by Applicant to promote goods bearing or sold under the DOOR-IN-DOOR mark.” 4 TTABVUE 6. These invoices bear dates in December 2013 and January and February 2014. November 25, 2019 Request for Reconsideration at TSDR 9-21. Because no supporting declaration was offered, we do not know whether these expenditures are included within the 2013 expenditures for “In-Store Display” listed in the chart. The chart contains no such entries for 2014.

²⁹ November 25, 2019 Request for Reconsideration at TSDR 4.

entries for individual or multiple years. The chart does not cover 2012, the year in which Applicant claims use of the proposed mark began, lists very modest expenditures in 2013 limited solely to in-store displays, which by definition were exposed only to retail shoppers, and reflects no expenditures at all in 2014 and 2015. Slightly more than 80% of the total expenditures were in 2017 alone. The expenditures as a whole do not show the sort of sustained exposure of DOOR-IN-DOOR necessary to cause that highly descriptive term to become Applicant's mark.

Second, as noted and shown above, Applicant's advertising and promotional materials make frequent use of Applicant's house mark LG directly in front of, or in very close proximity to, the proposed DOOR-IN-DOOR mark.³⁰ Expenditures on such advertising and promotion have little, if any, probative value on the issue of whether DOOR-IN-DOOR alone has acquired distinctiveness. *La. Fish Fry Prods.*, 116 USPQ2d at 1265 (expenditures on advertising "bearing LOUISIANA FISH FRY PRODUCTS" found not to "establish that FISH FRY PRODUCTS had acquired distinctiveness."). In addition, more than half of the total expenditures have been on television advertising, but the record is devoid of examples of such advertising, and there is thus no evidence of how the proposed mark appears in such advertising, or whether, unlike Applicant's print advertising, its television advertising focuses on the applied-for mark alone.

³⁰ The same is true for many of the displays and descriptions of Applicant's refrigerators on the websites of resellers of the goods. May 23, 2019 Response to Office Action at TSDR 5, 7-8, 10, 15, 18.

Finally, because there is no declaration discussing the listed figures, we have no sense of their significance in Applicant's industry relative to other sellers of electric refrigerators. Without such context, we cannot determine the impact of the reported expenditures. *Cf. Target Brands, Inc. v. Hughes*, 86 USPQ2d 1676, 1681 (TTAB 2007) (confidential sales figures over a 14-year period indicated that the applicant had enjoyed a substantial degree of success in selling ULTIMATE POLO shirts, but the Board found that it was difficult "to accurately gauge the level of this success in the sun protective garment industry in the absence of additional information such as applicant's market share or how the ULTIMATE POLO product ranks in terms of sales in the trade."). We do not find Applicant's marketing expenditures of \$18 million over essentially two years "standing alone and without any context in the trade" to be "so impressive as to elevate [A]pplicant's highly descriptive designation to the status of a distinctive mark." *Id.*

We find, on the basis of the record as a whole, that Applicant did not carry its heavy burden of showing that its highly-descriptive proposed mark DOOR-IN-DOOR for electric refrigerators has acquired distinctiveness.

Decision: The refusal to register is affirmed.